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# Discussion of Recent Decisions

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## DISCUSSION OF RECENT DECISIONS.

ARMY AND NAVY—WAR RISK INSURANCE—WHETHER OR NOT BENEFICIARY CLAIMING RELATIONSHIP IN LOCO PARENTIS MAY RECEIVE BENEFITS OF NATIONAL SERVICE LIFE INSURANCE ACT WHEN RELATIONSHIP AROSE BETWEEN ADULTS—In *Zazove* v. *United States*,[1] an adult beneficiary designated in a policy of insurance issued pursuant to the National Service Life Insurance Act[2] brought suit to establish her right to receive payments under the policy after the government had denied her right thereto.[3] The heirs at law of the insured were made third-party defendants and filed a counterclaim for the proceeds on the ground that the beneficiary, although designated as aunt, was in fact

[1] 156 F. (2d) 24 (1946).

[2] 54 Stat. 1008, as amended by 56 Stat. 657; 38 U. S. C. A. §§ 801-2.

[3] Maulis v. United States, 56 F. (2d) 444 (1931), indicates that action in denying a claim is sufficient ground to warrant application to the courts. See also United States v. Williams, 278 U. S. 255, 49 S. Ct. 97, 73 L. Ed. 314 (1929).

no relative of the insured hence was not entitled thereto. Plaintiff, admitting the lack of blood relationship, then contended that, as she stood in loco parentis to the deceased soldier for more than a year prior to his entry into service, she was such a person as might be named as beneficiary.[4] It appeared that the insured, when 25 years of age, had gone to live with the plaintiff, then 48, and had continued to reside with her for over four years prior to his entrance into service and the issuance of the policy in question. The District Court held that the relationship of in loco parentis could not arise between adult persons and awarded the proceeds to the insured's heirs. Upon appeal by the plaintiff, the Circuit Court of Appeals for the Seventh Circuit reversed on the ground that a liberal construction of the congressional language forbade imposing a technical meaning upon the words "in loco parentis" and, since there was no dispute as to the acts which established that relationship, it ordered judgment in favor of the plaintiff.

As the common definition for the phrase "in loco parentis" indicates that the person be one "who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption,"[5] it has been held that the relationship could only exist between an adult and a minor.[6] That, at least, has been the tenor of the few Illinois cases on the subject,[7] and would seem to be a necessary inference to be drawn from any statutes dealing with related problems[8] or from analogous

[4] At the time the policy was issued, the act declared: "The insurance shall be payable only to a . . . parent (including person in loco parentis if designated as beneficiary by the insured) . . . The insured shall have the right to designate the beneficiary . . . but only within the classes herein provided. . . ." 54 Stat. 1008 at 1010, 38 U. S. C. A. § 802(g). The statute was subsequently amended to delete the phrase "including person in loco parentis if designated as beneficiary by the insured" and substituted instead the words: "The terms 'parent,' . . . include . . . persons who have stood in loco parentis to a member of the military or naval forces at any time prior to entry into active service for a period of not less than one year." See 56 Stat. 657 at 659, 38 U. S. C. A. §§ 801(f) and 802(g).

[5] 46 C. J., Parent and Child, § 174, p. 1334.

[6] Ex Parte Pye, 18 Ves. 140, 34 Eng. Rep. 271 (1811). See also 2 Williams on Executors, 7th Am. Ed., p. 652, where emphasis is put on the idea that the person in loco parentis must be one who "puts himself in the situation of the lawful father of the child, with reference to the father's office and duty of making provision for the child."

[7] See Brush v. Blanchard, 18 Ill. 46 (1854). The later holding in Faber v. Industrial Commission, 352 Ill. 115, 185 N. E. 255 (1933), indicates that the doctrine has remained unchanged.

[8] Ill. Rev. Stat. 1945, Ch. 4, § 1—1, dealing with adoption, restricts the proceeding to cover adoption of minor children only. See also Brown v. Hall, 385 Ill. 260, 52 N. E. (2d) 781 (1944). For purpose of inheritance taxation, the phrase is expressly limited to apply only if the "acknowledged" child was fifteen years of age or under: Ill. Rev. Stat. 1945, Ch. 120, § 375(5). See, however, In re Beach's Estate, 154 N. Y. 242, 48 N. E. 516 (1897), where the court held that it was no bar to a tax exemption that the relationship originated at a time when both parties were adults.

decisions.[9] Such has also been the policy followed by the Veterans' Administration[10] when applying the provisions of the War Risk Insurance Act of 1917 as amended,[11] or of the World War Veterans Relief Act of 1924.[12]

Prior to the instant case, only three decisions of the specific point had been rendered by federal district courts. In *Tudor* v. *United States*[13] the court said that the relationship was a legal impossibility where the so-called "child" had reached majority and was capable of providing for himself. Much the same result was achieved in *Howard* v. *United States*.[14] In the case of *Meisner* v. *United States*,[15] however, an opposite result was reached upon a set of facts where the insured, an adult at the time the relationship arose, had designated the daughter of the so-called "parents" as beneficiary, describing her as his "sister." Upon finding that the "parent-child" relationship existed, the court concluded that the beneficiary was within the permitted class,[16] for it said the statute should be accepted "in accordance with common understanding"[17] and, in the absence of express limitation, would permit the relationship to arise between adults. The instant case has now brought the balance even insofar as the decisions deal specifically with insurance policies issued to veterans.[18] A different result, however, has been reached in cases involving policies issued by private companies.[19]

It is probably desirable that such should be the case in view of the liberal attitude the courts have generally taken in favor of servicemen[20] and the policy of liberalism which permeates the entire structure of war risk insurance. Identical language in the present and prior acts ought

[9] Bartholomew v. Davies, 276 Ill. 505, 114 N. E. 1017 (1917); Capek v. Kropik, 129 Ill. 509, 21 N. E. 836 (1889).

[10] See Administrator's Decisions No. 536 and No. 675.

[11] 41 Stat. 371, Ch. 16, § 4, since repealed.

[12] 43 Stat. 607-8, § 3(5); 38 U. S. C. A. § 424(5).

[13] 36 F. (2d) 386 (1929).

[14] 2 F. (2d) 170 (1924).

[15] 295 F. 866 (1924).

[16] Although the policy was issued under the War Risk Insurance Act of 1917 as amended, 41 Stat. 371, since repealed, its provisions are analogous to the statute here concerned.

[17] 295 F. 866 at 868.

[18] Since the foregoing was written, another case from the same district as the Meisner case, that of Horsman v. United States, 68 F. Supp. 522 (1946), involving the same general problem, has reached an identical result as that achieved in the Meisner case and the instant one. The preponderance of weight, then, now favors the instant case.

[19] Hummel v. Supreme Conclave, Improved Order Heptasophs, 256 Pa. 164, 100 A. 589 (1917).

[20] Boyette v. United States, 86 F. (2d) 66 (1936); United States v. Martin, 54 F. (2d) 554 (1931); McNally v. United States, 52 F. (2d) 440 (1931); United States v. Sligh, 31 F. (2d) 735 (1929); and United States v. Cox, 24 F. (2d) 944 (1928).

to receive the same interpretation if the intention of Congress is to be carried out.[21] The generous policy underlying the National Service Life Insurance Act calls for a breadth of interpretation of equal scope in the absence of clear limitation on the point. Even if such were not the case, there are equities in favor of a decision like the instant one for it is common knowledge that little was done to give servicemen a complete education in the basic principles governing the choice of a beneficiary or the consequences of making an improper choice. To deny relief to a designated beneficiary who may have provided the sentimental, if not the substantial, side of the parent-child relationship in order to favor a relative, would indeed place the law in the position of vouching for the adage that "blood is thicker than water".

R. W. BEART.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WHETHER THE SIXTH AMENDMENT GUARANTEES AN ACCUSED PERSON THE RIGHT TO CHOOSE AS HIS ATTORNEY ONE NOT ADMITTED TO LOCAL PRACTICE—The defendants in *United States* v. *Bergamo*,[1] residents of New Jersey, were seized by the police while in Pennsylvania where they had gone to deliver counterfeit gasoline and sugar ration stamps. They were indicated for a federal offense[2] and were arraigned in a district court sitting in the latter state. Defendants retained a New Jersey lawyer in good standing in his own state to represent them. As the lawyer had not been admitted in the particular district court, a member of the local bar was also retained as resident associate counsel,[3] but the understanding was that the New Jersey lawyer should be admitted specially[4] and would actively conduct the defense. When the case was reached for trial, the district judge, who happened also to be a resident of New Jersey and who seemingly felt that some reflection might be cast by reason of the appearance of New Jersey lawyers before him, announced that the defendants' principal counsel and all like him, would not be permitted to appear in behalf of their clients.[5] The resident counsel moved for a continuance because of

[21] Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 18 S. Ct. 347, 42 L. Ed. 752 (1898).

[1] 154 F. (2d) 31 (1946).

[2] 18 U. S. C. A. § 72.

[3] Rule 3 of the U. S. Dist. Ct. for the Middle Dist. of Pa. provides: "Any attorney . . . who is not a resident . . . shall in each proceeding in which he appears have associate counsel, resident of and maintaining an office in the District. . . ."

[4] Rule 2, ibid., provides: "Attorneys and counselors admitted to practice before other courts, who do not possess the full qualifications required by the foregoing rule, may be admitted specially for the purpose of a particular case."

[5] The attorney remained in the courtroom but took no part in the proceedings and, during the later stages became ill and was obliged to absent himself.

his lack of familiarity with the case, but the motion was denied. After a trial in which the resident counsel was said to have cross-examined in a very competent fashion, the defendants were convicted. On appeal, a contention by the defendants that they had been denied their constitutional right to be represented by counsel of their choice[6] was sustained when the Circuit Court of Appeals for the Third Circuit reversed and remanded the case for a new trial, pointing out that while the district court might have some discretion respecting the special admission of counsel in civil cases, no such discretion was permitted in criminal cases.

There does not appear to be any case presenting the exact problem involved in the instant case, although there is dictum in earlier cases which tends to point in the direction of such a holding.[7] It has even been stated that the "right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[8] But there is also no question but what the right cannot be insisted upon to the point where, or in a manner which, to do so would obstruct orderly procedure of the courts and prevent them from an exercise of their inherent powers.[9] In view of the fact, then, that the defendants in the instant case had been given advance notice that their chosen attorney would not be permitted to appear in their behalf[10] and had ample opportunity to choose another from an adequate number of competent members of the local bar, the trial court's ruling would seem sound.

The determination that the rule regarding special admission of at-

[6] While U. S. Const., Amend. 6, merely states that the accused shall "have the assistance of counsel," it has been held to intimate the right to counsel of his own selection: Smith v. United States, 53 App. D. C. 53, 288 F. 259 (1923).

[7] In Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527 (1932), it was indicated that the accused should be granted an opportunity to select his own counsel before the court makes an appointment. Accord: Walker v. State, 194 Ga. 727, 22 S. E. (2d) 462 (1942); People v. Shiffman, 350 Ill. 243, 182 N. E. 760 (1932). If counsel is appointed, the court must see to it that defendants with possible adverse interests are represented by separate attorneys: Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). It is also error, according to People v. Price, 262 N. Y. 410, 187 N. E. 298 (1933), to appoint counsel prior to the time when the attorney selected by the defendant has withdrawn his appearance. The right of free choice in civil cases, but not involving choice of non-resident counsel, is discussed in In re Mandell, 69 F. (2d) 830 (1934), and Kerling v. G. W. Van Dusen & Co., 109 Minn. 481, 124 N. W. 235 (1910).

[8] Murphy, J., in Glasser v. United States, 315 U. S. 60 at 76, 62 S. Ct. 457, 86 L. Ed. 680 at 702.

[9] Smith v. United States, 53 App. D. C. 53, 288 F. 259 (1923). The trial court there delayed starting the trial a seasonable amount of time because of the absence of defendant's chosen attorney, then appointed counsel. The case had proceeded to the point where a jury had been impanelled and a witness sworn before defendant's original attorney arrived. Held: no error, because defendant was responsible for the situation, in absence of showing of actual prejudice.

[10] 154 F. (2d) 31 at 33.

torneys to practice had to yield to the defendants' right to counsel of their own choice also involves an issue to which the Circuit Court of Appeals appears to have given very little consideration. The question might be restated to be one as to whether or not there are any limits to the accused person's choice. He undoubtedly may reject the offer of counsel and act as his own attorney, if his waiver is intelligently made.[11] Unquestionably, his selection of a regularly admitted local attorney would be honored,[12] may even be ordered, if he was financially able to provide for his own defense.[13] When he seeks to retain an outside attorney, however, his desire comes into conflict with the well established proposition that not every one may act as an attorney at law for another, the practice being limited to those who have been duly licensed and admitted to practice. Certainly no court would regard itself bound to listen to a chosen advocate whose license had been forfeited for misconduct despite the fact that he might possess the skill and training of the most competent lawyer. Can the accused, then, force an attorney upon a court merely because he happens to be in good standing elsewhere? Admitted that courts will generally grant special license for a particular case in a spirit of comity, the intrinsic problem is whether it can be forced to do so. Granted that a constitutional right would be superior to any mere rule of court, especially if the latter was in conflict with the former,[14] is the accused person's right to counsel so broad as the court in the instant case would indicate it to be?

In common-law days, the accused possessed no such right whatever and counsel was permitted to speak in his behalf only if some question of law was involved.[15] Any present assurance of aid of counsel, then, is to be found simply because of constitutional or statutory provisions. Viewed from the angle of state practice, the case of *Betts* v. *Brady*[16] would indicate that the constitutional right to assistance of counsel is far from an absolute one nor is it one which must be accorded in all criminal cases, for it was there held unnecessary to appoint counsel for an indigent defendant in a non-capital felony case in the absence of local constitutional or statutory mandate. Not even the Fourteenth Amendment, with its requirement of due process, was deemed enough to make the assistance of counsel compulsory.

[11] United States v. Mitchell, 137 F. (2d) 1006 (1943), and 138 F. (2d) 831 (1943).

[12] People v. Price, 262 N. Y. 410, 187 N. E. 298 (1933).

[13] See, for example, Ill. Rev. Stat. 1945, Ch. 38, § 730; State v. Steelman, 318 Mo. 628, 300 S. W. 743 (1927).

[14] People v. Davis, 357 Ill. 396, 192 N. E. 210 (1934).

[15] Sir William Withipole's Case, Cro. Car. 147, 79 Eng. Rep. 730 (1628).

[16] 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 107.

It is true that the Federal constitution grants the right to have the aid of counsel in "all criminal cases," but the term "counsel" as used therein can be understood to have only one meaning, *i. e.* a duly licensed and admitted attorney at law. It was so understood at the time the constitution was adopted[17] and its meaning has not changed.[18] The right of the judiciary to select its own officers is equally well understood, even to the point where admission to practice before the United States Supreme Court does not confer the right to practice in the lower federal tribunals or before the state courts.[19] As an Illinois court once expressed the idea, "It would be strange, indeed, if the court can control its own court room, and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers."[20] The rule involved in the instant case, therefore, seems to be perfectly consistent not only with the constitutional rights of the accused but also with generally accepted tenets regarding admission to practice in that it placed a discretion, by saying non-resident attorneys "may be admitted," where it properly belonged, that is in the court where the practice was to occur.

Without doubt, a denial of the right to appear as counsel for an accused person on purely arbitrary grounds would violate constitutional rights, for it has been said that the power to admit "is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility . . . it is the duty of the court to exercise and regulate it by a sound and just judicial discretion."[21] It does not appear in the instant case, however, that the action of the trial judge was reversed for an abuse of judicial discretion. Instead, the Circuit Court of Appeals, giving a mandatory effect to the rule, said that the circumstances "required" that the nonresident attorney be admitted specially, although the only circumstance of importance seemed to be that such attorney happened to be the one of defendants' choice. Carrying this interpretation to a logical conclusion, a district court might find itself obliged to permit repeated appearances of a non-resident attorney, if he was chosen by a succession of persons charged with crime, even though it might not be willing to grant him a general license.

[17] 3 Bl. Com. 26 indicates that no man "can practice as an attorney in any of those courts but such as is admitted and sworn an attorney of that particular court."

[18] 7 C. J. S., Attorney and Client, § 6, p. 711, states: "Attorneys being officers of the court, the power to admit applicants to practice law is judicial and not legislative, and is vested in the courts only."

[19] In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899). See also 1 Pollock & Maitland, Hist. Eng. Law, p. 211 et seq.

[20] In re Day, 181 Ill. 73 at 95, 54 N. E. 646 at 652.

[21] 7 C. J. S., Attorney and Client, § 6, p. 711.

Perhaps the only alternative would be to adopt the idea expressed in the civil case of *In re Mandell*[22] wherein a local rule forbade a trustee in bankruptcy from selecting counsel from among those interested in the case. The court there said: "Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel, and reasons which make it for the best interest of the estate the court select the attorney over the trustee's objection *should appear in the record.*"[23] If that idea were adopted, the defendant's supposed constitutional right to an attorney of his own choice, even one from outside the district, might be accommodated in the average case but still leave the trial court some discretion in the matter if the reasons impelling a denial thereof were sufficiently meritorious to warrant spreading the same on the public records.

N. McLean.

Criminal Law—Successive Offense and Habitual Criminals—Whether or Not a Prior Conviction for Crime Without the State May be Used to Support a Conviction Under the Illinois Habitual Criminal Act—A problem of first impression was presented to the Illinois Supreme Court in the recent case of *People* v. *Poppe*.[1] The defendant there was found guilty of burglary and, having been previously convicted of an offense within the purview of the Habitual Criminal Act,[2] was sentenced to a term of life imprisonment in the penitentiary under a provision which directs that second offenders shall be punished for the full term permitted for the last conviction.[3] The defendant took the case to the Supreme Court on error,[4] contending that the conviction under the Habitual Criminal Act could not be sustained since the previous offense of burglary had occurred in Ohio and the Illinois statute did not expressly provide that convictions without the state should be considered, as do similar statutes in many other states.[5] The Supreme Court nevertheless affirmed the sentence

[22] 69 F. (2d) 830 (1934).

[23] 60 F. (2d) 830 at 831. Italics added.

[1] 394 Ill. 216, 68 N. E. (2d) 254 (1946).

[2] Ill. Rev. Stat. 1945, Ch. 38, § 602. The second conviction need not be for the same offense as the prior one, but must be for one of the crimes enumerated in the statute: Kelly v. People, 115 Ill. 583, 4 N. E. 644 (1886).

[3] Ibid., Ch. 38, § 84, fixes the punishment for burglary at imprisonment for any term of years not less than one year or for life. A second conviction, pursuant to the Habitual Criminal Act, would carry a life sentence.

[4] Direct review is authorized by Ill. Rev. Stat. 1945, Ch. 38, § 780½.

[5] See, for example, Mason's Minn. Stat. 1927, § 9931, which provides: "Every person who, after having been convicted in this state of a felony or an attempt to commit a felony, *or under the laws of any other state or country* . . . shall be punished as follows. . . ." Italics added.

of the lower court, holding that convictions without the state were within the contemplation of the Illinois statute.

Although a search of the authorities reveals that many states have statutes providing for enhanced punishment of subsequent offenders and discloses that these acts have been the targets of repeated attacks on constitutional and other grounds, it yields few decisions which bear directly on the problem involved in the instant case.[6] About the turn of the present century, it had been definitely established that a statute increasing the punishment for successive crimes is not unconstitutional as imposing a penalty for crimes committed without the jurisdiction.[7] But long before that decision the principle seems to have been established that a statute may impose an aggrevated penalty on repeated offenders, so long as it expressly provides that crimes committed without the state be considered to determine the amount of punishment.[8] That a statute of this nature merely punishes more severely for the new crime because of the prior offenses has been generally regarded as proper by the courts.[9] Nor does the enumeration of specific felonies in such a statute violate due process requirements or operate to deny equal protection of the laws, since such classification, although it results in discrimination, has been held to be a proper matter for legislative discretion.[10] One general requirement, however, seems to be that the foreign conviction must be for such conduct as would amount to a felony under the laws of the forum if it had been committed therein.[11]

Where the statute expressly provides that prior convictions, whether within or without the state, shall be considered, the present problem is not likely to arise, although objections to being charged with a foreign conviction have been raised on a variety of grounds such as, for example, the claim that the offense had been pardoned,[12] that the sentence had

[6] See cases collection in annotations to People v. Gowasky, 244 N. Y. 451, 155 N. E. 737 (1927), in 58 A. L. R. 9; People v. Brown, 253 Mich. 537, 235 N. W. 245 (1931), in 82 A. L. R. 341; People v. Biggs, 9 Cal. (2d) 508, 71 P. (2d) 214 (1937), in 116 A. L. R. 205; Re Jerry, 294 Mich. 689, 293 N. W. 909 (1940), in 132 A. L. R. 89; People ex rel. Prisament v. Brophy, 287 N. Y. 132, 38 N. E. (2d) 468 (1941), in 139 A. L. R. 667.

[7] McDonald v. Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901).

[8] See reference to N. Y. Sess. Laws 1823, p. 179, § 6, in People v. Caesar, 1 Parker Cr. R. (N. Y.) 645 at 648 (1855).

[9] People v. Atkinson, 376 Ill. 623, 35 N. E. (2d) 58 (1941); State v. Findling, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449 (1913); State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542 (1894), affirmed in 159 U. S. 673, 16 S. Ct. 179, 40 L. Ed. 301 (1895).

[10] People v. Lawrence, 390 Ill. 499, 61 N. E. (2d) 361 (1945).

[11] 24 C. J. S., Criminal Law, § 1960(d).

[12] Pardon is apt not to relieve a defendant from the additional penalty: People v. Biggs, 9 Cal. (2d) 508, 71 P. (2d) 214, 116 A. L. R. 205 (1937), noted in 16 CHICAGO-KENT LAW REVIEW 187.

been suspended,[13] or that the prior offense was not identical in all of its elements with one punishable as a felony in the prosecuting state.[14] Where the statute does not contain such an express provision, judicial ruling on the problem herein considered is likely to be required.[15] As may be expected, the cases are not in accord as to the effect to be given such a statute. The court in the instant case concludes that the weight of authority permits the inclusion of foreign convictions in a prosecution under an habitual criminal act, and relies on decisions interpreting both the Minnesota and the Illinois types of habitual criminal statutes. Since the contention is not that a conviction in another state may not under any circumstances be considered, but that it shall not be charged against a defendant unless the statute expressly so provides, only the authorities from states with statutes similar to the Illinois act need be examined.

Of the cases cited in support of the court's position, only two have been found to be directly in point. One of the cases relied upon is that of *Fennen* v. *Commonwealth*.[16] There, an indictment had been returned against the defendant charging him with the commission of a felony and alleging that he had been twice previously convicted in Ohio, a sister state. The life sentence of the lower court was sustained, but the case is no authority for the proposition under examination for the defendant's objections went to the sufficiency of the language of the indictment in that the laws of Ohio were not pleaded *haec verba*. No point was made as to the admission of the Ohio convictions as such, doubtless for the very good reason, not noticed by the Illinois court in the instant case, that the Kentucky statute was not similar to the Illinois act but expressly provided that convictions whether within or without the state might be considered.[17] In the Texas case of *Johnston* v. *State*,[18] a conviction under an habitual criminal statute similar to that of Illinois was upheld notwithstanding the fact that the prior convictions had taken place in Okla-

[13] A defendant has been held properly convicted as a second offender despite the fact that sentence on the previous conviction was suspended: People v. Wilson, 12 N. Y. S. (2d) 395, 257 App. Div. 893 (1939), affirmed in 281 N. Y. 712, 23 N. E. (2d) 542 (1939).

[14] Substantial similarity in the offenses seems to be sufficient: State v. Young, 345 Mo. 407, 133 S. W. (2d) 404 (1939).

[15] The Illinois statute has been in force since 1883; Laws 1883, p. 76. The issue was raised once before in People v. Stack, 391 Ill. 15, 62 N. E. (2d) 807 (1945), but as the habitual criminal count was nolle prossed there was no decision thereon.

[16] 240 Ky. 530, 42 S. W. (2d) 744 (1931).

[17] Carroll's Ky. Stat. 1930, § 1130, provides: "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction . . . Judgment in such cases shall not be given for the increased penalty, unless the jury shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state."

[18] 130 Tex. Cr. 524, 95 S. W. (2d) 439 (1936).

homa. That result was foreshadowed by a decision of the Texas court, rendered two years earlier, when it had permitted the inclusion of a conviction in a federal court located within the state.[19] A case not mentioned in the opinion in the instant case, but one supporting the outcome, is that of *Wiese* v. *State*.[20] A Nebraska statute there concerned provided that for a second or subsequent offense of chicken-stealing the offender should be deemed to be guilty of a felony and should be punished accordingly. It was held that upon conviction for the offense of chicken-stealing, an increase in the penalty could be imposed under the statute because of a prior conviction for a similar offense in Iowa.

Opposed to the foregoing cases are decisions from several other respectable jurisdiction. In the early case of *People* v. *Caesar*,[21] it was held that the defendant could not be punished for petit larceny as a second offender in New York, when the first larceny had been committed in Massachusetts, since the particular statute was silent with reference to offenses committed without the state. The court said that the penal statutes of each state must be construed to be applicable only to offenses committed within its own borders unless it affirmatively appear that the intention was otherwise.[22] In *Wiedner* v. *State*,[23] the defendant had had remitted to him six hundred days of a prison sentence in the New Jersey state prison. Subsequently, he was again committed to the state prison by a federal district court sitting within the state for a crime against the federal government. At the expiration of this term, he was taken to serve out the remitted portion of the state sentence. It was held, however, that the provisions of the local act did not apply where the second conviction was obtained in a federal court. Likewise, in Connecticut, under a statute imposing a heavier penalty upon an offender who had been twice before convicted, sentenced and imprisoned in a state prison or penitentiary, it was held that three prior convictions with accompanying detention in a state prison in New York would support a conviction as an habitual criminal,[24] but a confinement in a federal penitentiary would not, for the word "state" in the phrase "in a state prison or penitentiary" was regarded as qualifying the word "penitentiary" as

[19] Arnold v. State, 127 Tex. Cr. 89, 74 S. W. (2d) 997 (1934). The court intimated that the exact point had not been passed on before. Apparently its attention had not been directed to the decisions in Wiedner v. State, 59 N. J. L. 345, 36 A. 102 (1896), and State v. Delmonto, 110 Conn. 298, 147 A. 825 (1929). The Illinois Supreme Court, since the determination of the instant case and in reliance thereon, has also achieved the same result: People v. Gavalis, 395 Ill. 409, 70 N. E. (2d) 589 (1947).

[20] 138 Neb. 685, 294 N. W. 482 (1940).

[21] 1 Parker Cr. R. (N. Y.) 645 (1855).

[22] Accord: Commonwealth v. Stack, 20 Pa. Dist. R. 599 (1910).

[23] 59 N. J. L. 345, 36 A. 102 (1896).

[24] State v. Riley, 94 Conn. 698, 110 A. 550 (1920).

well as the word "prison."[25] The court held that since the statute was highly penal it should be strictly construed, and that it was up to the legislature to include a reference to a sentence in a federal penitentiary if that was what was intended. Finally, in *Lowe* v. *State*,[26] a relatively recent case and one directly in point, the indictment charged the defendant with possession of burglar tools in Georgia and alleged that he had been previously convicted of burglary in Tennessee. It was held that the habitual criminal act of Georgia was not applicable as the prior conviction and confinement had occurred in another state.

These latter decisions seem to indicate that the majority rule, if one could be said to exist, is to the effect that a conviction without the state may not be made the basis for the application of the habitual criminal statute unless the same so expressly provides. Bearing in mind that the primary rule for the interpretation of a penal statute is that it is to be strictly construed in favor of the accused,[27] certain decisions prior to a recent amendment of the Illinois statute[28] suggest that such a construction has previously prevailed in this state. Thus in one case the defendant was found guilty of burglary and, having a prior conviction of larceny of a motor vehicle against him,[29] he was sentenced as an habitual criminal. It was held that the conviction for larceny of a motor vehicle was not the same as one for grand larceny within the meaning of the habitual criminal statute.[30] In another case, that of *People* v. *Sarosiek*,[31] it was held that a larceny from the person,[32] in the absence of a finding that the value of the property so taken exceeded $15, was not a grand larceny[33] within the purview of the act,[34] despite the fact that a larceny from the person is to be treated as the same as grand larceny

[25] State v. Delmonto, 110 Conn. 298, 147 A. 825 (1929).

[26] 50 Ga. App. 369, 178 S. E. 203 (1935), conforming to answer to a question certified in 179 Ga. 742, 177 S. E. 240 (1934).

[27] People v. Lund, 382 Ill. 213, 46 N. E. (2d) 929 (1943).

[28] Laws 1941, Vol. 1, p. 573; Ill. Rev. Stat. 1945, Ch. 38, § 602. The amendment merely added to the list of offenses coming within the purview of the Habitual Criminal Act.

[29] That conduct constitutes a separate and specific crime according to Ill. Rev. Stat. 1945, Ch. 38, § 388a.

[30] People v. Parker, 356 Ill. 301, 190 N. E. 358 (1934). But an election to indict the defendant for grand larceny brings the prior conviction within the purview of the act, according to People v. Crane, 356 Ill. 276, 190 N. E. 355 (1934), even though the property stolen consists of an automobile.

[31] 375 Ill. 631, 32 N. E. (2d) 311 (1941).

[32] Ill. Rev. Stat. 1945, Ch. 38, § 387.

[33] Ibid., Ch. 38, § 389. The term "grand larceny" is not expressly defined by statute, but the courts have interpreted it to mean the theft of property of more than $15 in value, thereby distinguishing it from petty larceny on the basis of punishment.

[34] It is now enumerated as one of the habitual offenses by reason of an amendment added in 1941: Laws 1941, Vol. 1, p. 573.

for purpose of punishment.[35] It would seem, then, that the court in the instant case has departed from its own standards in failing to apply the strict type of construction it has heretofore used.

There is, of course, a subsidiary rule that directs that a statute is to be construed so as to give effect to the obvious intention of the legislature.[36] The court in the instant case said it saw an intention on the part of the legislature to include a foreign conviction because of the statutory direction that a "duly authenticated" copy of the record of a former conviction and judgment of any court of record should serve as *prima facie* evidence of such conviction.[37] It pointed out that a transcript of a judgment of a court within the state need only be certified to be admissible in evidence,[38] hence the use of an authenticated copy could refer only to an out-of-state conviction. However persuasive this argument may be, it would appear, in the light of decisions from other jurisdictions and by an application of the rule of strict construction, that the present decision is at least questionable. As to the propriety of the result, however, there is no dispute. It is fitting that a wrongdoer who persists in his criminal conduct, whether at home or abroad, should be socially isolated by confinement, the period of which ought to be determined by the fact of his prior convictions and independent of the place where they may have been obtained. But this should be a matter for the legislature, which can express its views on the question in language admitting of but one meaning.

J. E. GALT.

INFANTS—ACTIONS—WHETHER OR NOT A CAUSE OF ACTION EXISTS IN FAVOR OF A CHILD FOR PRENATAL INJURIES INFLICTED UPON IT—The case of *Bonbrest* v. *Kotz*[1] involved a re-appraisal of the question as to whether or not an infant, after its birth, might maintain a suit against the attending physician, upon a cause of action predicated on malpractice, for injuries sustained in the process of removal from the mother's womb. A motion for summary judgment, based upon the ground that the complaint failed to state a cause of action on behalf of the infant, was there denied when the United States District Court concluded that the child, being viable at the time the injury was inflicted, was sufficiently a person to have a standing in court and to possess the rights which attend on all human beings, especially if the child survived to be born alive.

[35] Ill. Rev. Stat. 1945, Ch. 38, § 389.

[36] Ash Sheep Co. v. United States, 252 U. S. 159, 40 S. Ct. 241, 64 L. Ed. 507 (1920).

[37] Ill. Rev. Stat. 1945, Ch. 32, § 603.

[38] Ibid., Ch. 51, § 13.

[1] 65 F. Supp. 138 (1946).

The decision was admittedly one without precedent either in the common law or in the jurisdiction of its determination, in fact was directly opposed to practically all recorded American cases dealing with the point,[2] and proceeded upon the concept that judges were free to mold the common law to meet changing conditions or to keep pace with progress in the other sciences. The infection of that bold disregard for fundamental doctrines such as was demonstrated recently in the case of *Daily* v. *Parker*[3] would, therefore, seem to be spreading through the federal judiciary. Dean Pound's prophesy that the law was "entering upon a new period of growth"[4] comes closer to accomplished fact.

Further novelty is projected into the case, however, by the idea that viability rather than birth or conception is to be deemed the test of human existence for the purpose of deciding whether the infant is a person capable of claiming human rights with their corresponding duties. The problem is not one of whether the mother can recover for injuries sustained by her at the time of the child's birth,[5] but whether the child can recover in his own right.[6] Only one similar case, a Canadian decision,[7] has reached the same result and there it was achieved upon the ground that (1) as the wrongful act might also constitute a crime against the unborn child it was difficult to see why its separate existence could not be recognized for purpose of redressing a tort, but (2) more likely because the court felt that the recovery by the parents would leave a residuum of injury for which compensation could not be had save at the suit of the child. The tenor of the reasoning underlying the decision is best exemplified by a quotation from the opinion. The court there said: "If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's

[2] See cases listed by the court, 65 F. Supp. 138 at 139, notes 1 to 4 inclusive. The court could have added Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. (2d) 446 (1939), noted in 27 Ill. B. J. 348, 87 U. of Pa. L. Rev. 1016; Ryan v. Public Service Co-ordinated Transport, 18 N. J. Misc. 429, 14 A. (2d) 52 (1940); In re Robert's Estate, 286 N. Y. S. 467 (1936); Lewis v. Steves Sash & Door Co., 177 S. W. (2d) (Tex. Civ. App.) 350 (1943). The only cases contra, from courts of inferior status, are Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939), predicated upon a provision of the California code, and Kine v. Zuckerman, 4 Pa. D. & C. 227, 97 A. L. R. 1525 (1939).

[3] 152 F. (2d) 174 (1945), noted in 25 CHICAGO-KENT LAW REVIEW 90.

[4] Pound, "The Spirit of the Common Law" (Marshall, Jones & Co., Boston, 1921), p. 181.

[5] See, for example, Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933).

[6] Recovery has been denied upon the theory that in the absence of contract with the child there can be no duty owed to it: Nugent v. Brooklyn Hts. R. Co., 154 App. Div. 667, 139 N. Y. S. 367 (1913); Walker v. Great Northern Ry. Co., 28 Irish L. R. 69 (1891). Expanding use of the doctrine of third-party beneficiary contracts would nullify the argument underlying such cases.

[7] Montreal Tramways v. Leveille, 1933 Can. Sup. 456, 4 Dom. L. R. 337 (1933).

fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor."[8]

Whatever might have been the view of the civil law,[9] it is undoubtedly true that the common law regarded a child *en ventre sa mere,* from the moment of conception rather that that of viability,[10] as a person capable of inheriting property[11] so long as the child was subsequently born alive.[12] The importance of such fictionalizing of personality can well be understood in the light of the then social significance of real property ownership and the feudal need for family perpetuation. At a time when much land was held under fee tail tenure, fictions of that character would be apt to be developed to prevent lapse of estates[13] but would be carried no farther than the need required. It is not remarkable, therefore, that the common law went no further than it did.

It is not so clear, however, that the unborn child was a person within the contemplation of the criminal law, Blackstone to the contrary notwithstanding.[14] More modern research has indicated that in common-law days such was not the case,[15] and abortion is generally treated as criminal today not because of any common-law doctrines but by reason of statutory prohibition.[16] There is, then, considerable uncertainty in the supposed analogy between tort law and criminal law used to support the instant case,[17] and expressed as a qualified "if" underlying the

[8] 1933 Can. Sup. 456 at 464, 4 Dom. L. R. 337 at 345.

[9] Dig. Just., lib. 1, tit. 5, § 26, does declare: "*Qui in utero sunt, in toto paene iure civilli intelligentur in rerum natura esse.*" But it should be noted that the statement is qualified by the adverb "almost" and talks of the unborn as "things" rather than as "persons."

[10] There is a medical distinction between an embryo, or foetus in its earliest stages of development, and a viable foetus, or one which has reached such a stage of development that it can live outside of the uterus: Encyclo. Americana, Vol. 10, p. 283.

[11] 1 Bl. Com., p. 130. See also Ill. Rev. Stat. 1945, Ch. 3, § 164.

[12] Smith v. Fox, 53 Ont. L. R. 54, 3 Dom. L. R. 785 (1923); Doe v. Clarke, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795); Goodale v. Gawthorne, 2 S. & Giff. 375, 65 Eng. Rep. 443 (1854).

[13] Allaire v. St. Lukes Hospital, 184 Ill. 359, 56 N. E. 638 (1900).

[14] It is stated, in 1 Bl. Com., p. 129, to be the law: "For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb: or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter."

[15] Rex v. Brain, 6 Car. & P. 349, 172 Eng. Rep. 1272 (1834). But see Rex v. Senior, 1 Mood. 346, 168 Eng. Rep. 1298 (1832), as to criminal responsibility for injury inflicted at time of birth.

[16] See, for example, 43 Geo. III, c. 58; Ill. Rev. Stat. 1945, Ch. 38, § 3.

[17] Judge McGuire, 65 F. Supp. 138 at 140, poses the query: "Why a 'part' of the mother under the law of negligence and a separate entity and person in that of . . . crime?" The answer would seem to be that they are not to be so regarded in the absence of a statute so declaring.

comparable Canadian decision.[18] When it is recalled that a tort is a private wrong whereas a crime involves conduct offensive to the public generally, there is still further reason for observing distinctions between them which distinctions become clouded by drawing attempted analogies such as was done in the instant case.

It must be said, then, that the law, as presently constituted, does not support the holding in the instant case. Yet it is regrettable that no remedy has been provided for situations like the one here involved, for professional men should be penalized for their incompetence. A way out has been indicated in California, for the code of that state declares that a child "conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."[19] That provision was interpreted, in *Scott* v. *McPheeters,*[20] to be sufficiently broad to permit suit, at the instance of the child, to recover for prenatal injuries inflicted upon it. Similar legislation enacted elsewhere should prove sufficient to create a cause of action in favor of the infant without the necessity of requiring judges to go beyond their province in devising remedies to fit hard cases. If such laws existed, it would be unnecessary to attempt distinctions between a child conceived and one that had reached the stage of viability, thereby eliminating some of the difficulty implicit in establishing a case like the instant one. It would not, however, obviate other difficulties in proving that the prenatal injury was proximately caused by the defendant's negligence or lack of skill, a factor which has led some courts to repudiate attempts to maintain such actions.[21] But difficulty in making proof, or the fact that damages may be deemed too remote to permit recovery, are scarcely reasons for denying the existence of a cause of action. Such things should merely serve to challenge the law and lawyers to keep pace with developments in other fields.

E. W. JACKSON.

[18] In Montreal Tramways v. Leveille, 1933 Can. Sup. 456 at 464, 4 Dom. L. R. 337 at 344, the court notes: ". . . *if the law recognizes the separate existence of the unborn child* sufficiently to punish the crime, it is difficult to see why it should not also its separate existence for the purpose of redressing the tort." Italics added.

[19] Deering, Cal. Civil Code, § 29.

[20] 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939).

[21] See note, 34 Harv. L. Rev. 549. In Kine v. Zuckerman, 4 Pa. D. & C. 227, 97 A. L. R. 1525 (1936), the court relied upon the unique theory that the defendant's neglect set in motion a harmful force which did not culminate in injury until the moment of birth. While that rationale was adopted to defeat the argument that the child was not in esse at the time of the wrong, hence could not sue, it might prove helpful in establishing a prima facie case. Since imbecility, paralysis, loss of function and the like are not normal incidents to natural birth under competent handling of delivery, the existence thereof might be regarded as a type of res ipsa loquitur.

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER OF NOT CITIZEN ACQUITTED ON CRIMINAL CHARGE CAN COMPEL SURRENDER OR DESTRUCTION OF FINGERPRINTS AND OTHER IDENTIFYING RECORDS TAKEN BY POLICE AT TIME OF ARREST—In the case of *State ex rel. Mavity* v. *Tyndall*[1] the Indiana Supreme Court had occasion to construe the effect of a local statute[2] which had created a State Bureau of Identification and had provided for the securing, by local police, of photographs, fingerprints and the like of persons convicted of certain crimes or who were well-known and habitual criminals. The statute required that such records be retained to compose an identification system integrated with those of other states and the one maintained by the Federal Bureau of Investigation. The statute was silent, however, as to what should be done with the records in the event the accused had no previous criminal record and was acquitted upon a proper hearing. According to that case, the relator, who had no criminal record except for one traffic violation, was arrested for gaming and keeping a gaming device. Following customary police practice, but against his will, relator's fingerprints were taken, he was photographed, a specimen signature was obtained, and certain descriptive material was added. Three sets of these records were made; one being retained at the local police headquarters, one being sent to the state police central office, and the third filed with the federal bureau. The criminal charges were subsequently dismissed. When relator sought the return of these records, his request was refused. He then sought to mandamus the local officials to compel surrender or destruction of the records claiming that the exhibition thereof in a rogue's gallery invaded his right of privacy. He conceded that the police had the right to secure the records in the first instance for purpose of identification, to arrange for his safekeeping pending trial or to aid in his recapture in case of escape, but claimed such purposes were spent after his acquittal. Upon finding that relator's photograph had been placed in a rogue's gallery and had been viewed by members of the public attempting to identify persons accused of committing other crimes, the Indiana Supreme Court concluded that relator's right of privacy had been invaded and, as a consequence, it reversed a judgment sustaining a demurrer to his complaint. It did indicate, however, that the retention of fingerprint records alone would ordinarily give rise to no unfavorable publicity as such records could be read only by experts.

Cases in point, either from Indiana or from other jurisdictions, are comparatively rare. The earlier decisions denied relief, although on

[1] — Ind. —, 66 N. E. (2d) 755 (1946).

[2] Burns Ind. Stat. Ann. 1933, § 47-846 et seq. See also Acts 1945, Ch. 344, §§ 12-14.

grounds unconnected with any right of privacy. More recent cases, however, disclose a tendency to provide a remedy when an innocent person's right of privacy has been wrongfully invaded as by taking and distributing identification records after arrest and before trial. The first Indiana case, that of *State ex rel. Burns* v. *Clausmier,*[3] for example, was one in which the arrested person, after his discharge, sought to recover damages on a sheriff's bond for the taking of his photograph while in custody on a charge of forgery. The court held that, as there was no official duty on the part of the sheriff to take photographs for identification records and to publish them before conviction, there could be no recovery on the official bond. The question of whether or not the sheriff could have been held personally liable, as for the publication of a libel, was not before the court and was not decided. With the passage of the Indiana statute construed for the first time in the instant case, a different result for similar litigation in that state might now well be obtained.

Early cases in New York also denied relief to persons seeking the return or destruction of identification records. In *Owen* v. *Partridge, Police Commissioner,*[4] it was pointed out that "any invasion of one's right to be let alone can be remedied only by a statutory enactment directed against the particular case."[5] An innocent man, in another case, whose prison records were still on file after he had been acquitted of first degree murder upon appeal, was also referred to the legislature.[6] Relief was likewise denied, in *Gow* v. *Bingham,*[7] on the ground that mandamus was an improper remedy, although the court recognized that a gross injustice had been committed in obtaining the identification records prior to even a preliminary hearing.

In the Maryland case of *Downs* v. *Swann,*[8] the accused person sought to obtain an injunction against the police officials but failed to allege that the defendants were improperly planning to place his picture, after acquittal, in an existing rogue's gallery. Upon police denial that it was their practice to so use such photographs unless the offender was convicted or escaped custody, injunctive relief was denied. The court did state, however, that police officers "have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable, to the injured person, in the same manner

[3] 154 Ind. 599, 57 N. E. 541 (1900).
[4] 40 Misc. 415, 82 N. Y. S. 248 (1903).
[5] 40 Misc. 415 at 421, 82 N. Y. S. 248 at 253.
[6] In re Molineux, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104 (1904).
[7] 57 Misc. 66, 107 N. Y. S. 1011 (1907).
[8] 111 Md. 53, 73 A. 653 (1909).

and to the same extent that private individuals would be.'"[9] Much the same rationale has been followed in Arkansas[10] and Washington.[11]

An attempt to resolve the conflict between the rights of society on the one hand and those of the individual on the other may be observed in the New Jersey case of *Bartletta* v. *McFeeley, Commissioner of Public Safety,*[12] where the court refused to enjoin the police exhibition of the accused's identification records, in the absence of any showing that malice prompted the police to expose plaintiff to ridicule and disgrace, on the ground that public safety required the exercise of a certain amount of discretion on the part of police officials. Shortly thereafter a statute was adopted requiring the immediate taking of photographs and fingerprints of a person arrested for an indictable offense as well as the forwarding of copies thereof to the state Bureau of Identification without delay.[13] As is the case with most such statutes, no mention was made therein of the right of an accused person, if acquitted, to secure the surrender or destruction of these records. Under the circumstances, when the plaintiff in the case of *Fernicola* v. *Keenan*[14] asked for the surrender of records because he was never indicted, the court again said the question of whether or not the records were to be retained was a question to be decided by the police. In that regard, the chancellor said: "The taking of the fingerprints in the first place and the whole process of arrest of a possibly innocent person are a humiliation to which he must submit for the benefit of society. To the same end, the police are justified in retaining such records, in certain cases, after an acquittal or a failure of the Grand Jury to indict . . . On the other hand, when a man of good repute has a false charge made against him and is cleared of it, it seems to me that the police should destroy his fingerprints or photographs or remove them from the Rogues' Gallery. But in the absence of the statute, discretion in the matter belongs to the police . . . It is not for the court to make decision."[15]

Two later cases arising in New Jersey brought the problem into sharper focus. In one of them, that of *Jenkins* v. *McGovern,*[16] the arrested person obtained a temporary injunction restraining the sheriff

[9] 111 Md. 53 at 64, 73 A. 653 at 656.

[10] Mabry v. Kettering, 92 Ark. 81, 122 S. W. 115 (1909).

[11] Hodgeman v. Olsen, Supt. State Reformatory, 86 Wash. 615, 150 P. 1122 (1915).

[12] 107 N. J. Eq. 141, 152 A. 17 (1930), affirmed in 109 N. J. Eq. 241, 156 A. 658 (1931).

[13] Rev. Stat. N. J., Vol. II, § 53:1—19.

[14] 136 N. J. Eq. 9, 39 A. (2d) 851 (1944).

[15] 136 N. J. Eq. 9 at 10, 39 A. (2d) 851 at 851-2.

[16] 136 N. J. Eq. 563, 43 A. (2d) 526 (1945), reversed in — N. J. Eq. —, 45 A. (2d) 844 (1946).

from distributing the records, at least before verdict of guilty, to the federal authorities, to the police of other states, and of other countries. When the sheriff respected the temporary injunction, and also refrained from acting as to other arrested persons, he was indicted for failure to perform his duty. He then sought to prevent the prosecuting officials from violating his right of privacy by photographing him and disseminating his identification records prior to conviction.[17] As the court felt the mere taking of the photograph and fingerprint impressions before conviction would do no harm, it did not enjoin such action. It did not, however, have the same opinion about forwarding copies of such records to other police before a verdict of guilty, and held that so much of the statute as required the premature dissemination of such records violated constitutional rights.[18]

The improper display of a photograph in a rogue's gallery has also been denounced in the recent Missouri case of *State ex rel. Reed* v. *Harris*[19] where pictures of the accused, who had no record of conviction for felony, were taken while he was held for a traffic violation. When the accused, contending that the statute provided merely for the taking and keeping of records of persons convicted of a felony whose convictions had not been set aside or reversed,[20] asked for an injunction, the state Bureau of Identification sought a writ of prohibition to stop the trial judge from entertaining that proceeding, but did not succeed on much the same theory as that developed in New Jersey.

Two cases from Louisiana definitely uphold a right of privacy on the part of an innocent person of such character as to warrant preventing the retention and distribution of pictures of the accused even though, in each case, the plaintiff had been arrested on numerous occasions.[21] The reasoning behind both decisions rests on the fact that posting a picture in a rogue's gallery and sending it to other jurisdictions as a criminal record constitutes permanent proof of dishonesty which is unwarranted unless and until a conviction is obtained.

These are the only cases which have reached reviewing courts, but further material may be gathered by examining the practices of police officials in making criminal identification files. The Illinois practice is

[17] McGovern v. Van Riper, 137 N. J. Eq. 24, 43 A. (2d) 514 (1945).

[18] The statute was said to be an improper exercise of the police power in view of the natural and inalienable rights belonging to every citizen: 137 N. J. Eq. 24 at 46, 43 A. (2d) 514 at 525.

[19] 348 Mo. 426, 153 S. W. (2d) 834 (1941).

[20] Mo. Rev. Stat. Ann., Vol. 12, § 4184.

[21] Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905), affirmed in 117 La. 708, 42 So. 228 (1906); Schulman v. Whitaker, 115 La. 628, 39 So. 737 (1905), affirmed in 117 La. 704, 42 So. 227 (1906).

illustrative. Under the rules and regulations of the state Bureau of Identification, as well as of local police, it has become standard practice to secure photographs, fingerprint impressions, Bertillon measurements, and the like of virtually all persons arrested except those seized for traffic violations and for juvenile offenders. Such information is kept in local police and state files, is sent to the federal bureau and is made available to the police of other states, if requested by them. Complaining witnesses are permitted to view photographs on file when attempting to identify offenders. While the Illinois statute provides for keeping these records, it declares that they are not to be made public except where necessary in the identification of persons accused of crime or, on trial, where such persons have been previously imprisoned for prior offenses.[22] Petitions have, therefore, been filed in *nisi prius* courts seeking the surrender or destruction of such identification records where the accused person has subsequently been discharged and, after due consideration of the circumstances, such petitions have been allowed or denied on the merits of each individual case. The matter has, however, been left on no more firm foundation than that, not only in Illinois but in most of the states whose statutes are silent on the point. In only ten instances is there specific treatment on the subject, by requiring either the destruction of such records,[23] their return to the accused person,[24] or their return upon request,[25] provided the accused person has been acquitted.

The need for adequate identification records to aid in the apprehension of criminals is recognized. In the discharge of their general duty to protect the public, police officials may well have occasion to take photographs, fingerprints and the like of arrested persons. But the falsely accused person is likewise in need of protection against the disgrace and humiliation of being permanently cataloged with felons. Police officials may exercise their discretion properly and avoid the demand for legislative action. But discretion may be abused, in fact has been so abused judging by the decided case, so if the legislature has not acted, the courts should allow relief, as in the instant case, by recognizing an innocent person's right of privacy.

Mrs. D. W. SPINKA

[22] Ill. Rev. Stat. 1945, Ch. 38, §§ 780a-780g.

[23] Iowa Code, § 728.8; N. H. Rev. Laws 1942, Ch. 421, § 16—19; R. I. Gen. Laws 1938, Ch. 620, § 7.

[24] Conn. Gen. Stats. 1941, Ch. 127, §§ 399f-405f; Mason's Minn. Stats. 1941, § 626.40; Thompson, N. Y. Cons. Laws, Penal Law, § 516; W. Va. Code Ann. 1943, § 1264(1).

[25] Mich. Stat. Ann., Vol. II, Ch. 24, § 4.462 and § 4.463; Page's Ohio Gen. Code Ann., Vol. II, § 1841-18; Vt. Pub. Laws 1933, § 5503.

INSURANCE—EXTENT OF LOSS AND LIABILITY OF INSURER—WHETHER OR NOT FACT DEATH OCCURRED IN MILITARY SERVICE PRECLUDES RECOVERY ON LIFE INSURANCE POLICY CONTAINING MILITARY SERVICE CLAUSE—The proper construction to be given to a "war clause", excepting liability in a life insurance policy, was the prime controversy in the recent case of *Hooker* v. *New York Life Insurance Company.*[1] Plaintiff there sued as the beneficiary of an insurance policy upon the life of his son who was killed by an accidental fall from a cliff during training as a United States Marine on active duty in New Zealand. Controversy as to the essential facts of his death was more formal than real. Liability for double indemnity was denied by the insurance company under an exemption clause that limited liability "if the insured's death resulted directly or indirectly from . . . (d) War or any act incident thereto." Recovery on the policy was allowed on the ground that the insured's death did not "result" from an act incident to war.

While "war" or "service" exemptions are not against public policy,[2] for an insurance company has the right to select the risks it will assume,[3] the applicability of any given policy exception is not a question of fact but a matter of construction for the court.[4] Courts have been found to adopt the construction most favorable to the insured,[5] but at that point accord ceases. Any apparent conflict is due in a great measure to the difference in the phraseology of the exemption clauses, but the courts, in many of these cases, adopting an interpretation against the company, have gone to some length in taking a particular word or phrase in the military clause, construing the same as ambiguous, then resolving that ambiguity as meaning activity of a military nature rather than status, thereby holding the insurer liable.[6]

Three distinct lines of cases may be discerned in the treatment given by the courts to what may be generically termed "war" or "military" exemption clauses. The narrowest class is one in which the *status* of the insured, present where the clause typically reads "while in military or

[1] 66 F. Supp. 313 (1946).

[2] Miller v. Illinois Bankers' Life Ass'n, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919).

[3] Marks v. Supreme Tribe of Ben Hur, 191 Ky. 385, 230 S. W. 540 (1921).

[4] Bull v. Sun Life Assur. Co., 141 F. (2d) 456 (1944), cert. den. 323 U. S. 723, 65 S. Ct. 55, 89 L. Ed. 581 (1944).

[5] Aschenbrenner v. United States Fid. & G. Co., 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137 (1934).

[6] Bending v. Metropolitan Life Ins. Co., 74 Ohio App. 182, 58 N. E. (2d) 71 (1944).

naval service", is regarded as the sole criterion.[7] Expounding on such a clause, the Ohio Appellate Court once said, "This language is clear and unambiguous. There is nothing to construe. The language plainly makes status of the insured in military or naval service the ground of exemption from liability."[8] Nor is the duty status of the insured material, for the same court indicated that one "is in the military service from the time he takes the oath until he receives his discharge, honorable or otherwise."[9] Under this type of exemption, then, the only inquiry is whether the insured was in military or naval service at the time his death or disability was incurred;[10] causation or activity is not a factor.[11]

The nature of the *activity* in which the insured was engaged at the time of his death or disability forms the basis of the middleground viewpoint adopted by many of the courts,[12] a viewpoint which incorporates

[7] The following cases, involving interpretation of the quoted clauses, are illustrative: Miller v. Illinois Bankers' Life Ass'n, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919), ("while in the service in the army or navy . . . in time of war"); State Mut. Ins. Co. v. Harmon, 72 Ga. App. 117, 33 S. E. (2d) 105 (1945), ("under enrollment in any branch of military or naval service in time of war"); Life & Casualty Ins. Co. v. McLeod, 70 Ga. App. 181, 27 S. E. (2d) 871 (1943), ("while enrolled in military or naval service in time of war"); Bradshaw v. Farmers' & Bankers' Life Ins. Co., 107 Kan. 681, 193 P. 332, 11 A. L. R. 1091 (1920), ("shall engage in military or naval service in time of war"); Ruddock v. Detroit Life Ins. Co., 209 Mich. 638, 177 N. W. 242 (1920), ("enter or be engaged in such [military or naval] service"); Slaughter v. Protective League Life Ins. Co., 205 Mo. App. 352, 223 S. W. 819 (1920), ("while engaged in military or naval service in time of war"); Olson v. Grand Lodge A. O. U. W. of North Dakota, 48 N. D. 285, 184 N. W. 7 (1921), ("engage in occupation of soldier in time of war").

[8] Bending v. Metropolitan Life Ins. Co., 74 Ohio App. 182, 58 N. E. (2d) 71 (1944).

[9] 74 Ohio App. 182 at 191, 58 N. E. (2d) 71 at 75.

[10] Miller v. Illinois Bankers' Life Ass'n, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. (1919); Life & Casualty Ins. Co. v. McLeod, 70 Ga. App. 181, 27 S. E. (2d) 871 (1943); Olson v. Grand Lodge A. O. U. W. of North Dakota, 48 N. D. 285, 184 N. W. 7 (1921); Bending v. Metropolitan Life Ins. Co., 74 Ohio App. 182, 58 N. E. (2d) 71 (1944).

[11] Bradshaw v. Farmers' & Bankers' Life Ins. Co., 107 Kan. 681, 193 P. 332 (1920).

[12] Illustrative of this class are the following cases: Benham v. American Central Life Ins. Co., 140 Ark. 612, 217 S. W. 462 (1919), ("engaged in military or naval service in time of war, or in consequence of such service"); Long v. St. Joseph Life Ins. Co., 225 S. W. (Mo. App.) 106 (1920), affirmed in — Mo. —, 248 S. W. 923 (1923), ("while engaged in any military or naval service in time of war"); Reid v. American Nat. Assur. Co., 204 Mo. App. 643, 218 S. W. 957 (1920), ("engage in military or naval service in time of war"); Malone v. State Life Ins. Co., 202 Mo. App. 499, 213 S. W. 877 (1919), ("engage in military or naval service and die while so engaged"); Myli v. American Life Ins. Co., 43 N. D. 495, 175 N. W. 631, 11 A. L. R. 1097 (1919), ("while engaged in military or naval service in time of war"); Illinois Bankers' Life Ass'n v. Davaney, 102 Okla. 302, 226 P. 101 (1924), ("while in the service in the army or navy in time of war"); Barnett v. Merchants' Life Ins. Co., 87 Okla. 42, 280 P. 271 (1922), ("engage in military service in time of war"); Young v. Life & Casualty Ins. Co. of Tennessee, 204 S. C. 386, 29 S. E. (2d) 482 (1944), ("while insured is in military or naval service in time of war"); West v. Palmetto State Life Ins. Co., 202 S. C. 422, 25 S. E. (2d) 475 (1943), ("engaged in military or naval service in time of war"); Kelly v. Fidelity Mut. Life Ins. Co., 169 Wis. 274, 172 N. W. 152, 4 A. L. R. 845 (1919), ("engage in military service in connection with actual warfare and shall die as result").

some aspects of status and some of causation.[13] When denying operative effect to an exemption which read "While engaged in any military or naval service in time of war" in a case where the insured died of natural causes while home on furlough, a Missouri court once said, "If insured's mere status of being an enlisted soldier or sailor at the time of his death is to give effect to the clause and reduce liability, what necessity existed for saying therein that death must occur while insured is 'engaged' in any such service? As applied to military or naval service, the word 'engaged' denotes action or participation in something done in that service. By putting the word 'engaged' in the exemption clause, the idea is conveyed that death must occur while insured is participating or taking part in that service in some way, and not merely during the period he occupies the status of being a soldier or sailor."[14]

In discussing causation under a similar clause, an Arkansas court stated, "In the case at bar the insured died from influenza, and the record shows that this disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it. The death of the insured, then, was in no sense caused by performing any military service, or in consequence of *being engaged* in military service."[15] The inquiry in cases of this character, then, includes not only an investigation as to the insured's status and his activity within that service,[16] but also as to causal factors[17] peculiar to military service[18] in order to determine the effect to be given to the exception.[19]

The third group of cases turns on the *causal relation* between the military and naval service, or war, and the death or disability of the

[13] See Benham v. American Central Life Ins. Co., 140 Ark. 612, 217 S. W. 462 (1919), Malone v. State Life Ins. Co., 202 Mo. App. 499, 213 S. W. 877 (1919), and Kelly v. Fidelity Mut. Life Ins. Co., 169 Wis. 274, 172 N. W. 152 (1919), for examples of the incorporation of this dual nature in the very clause itself.

[14] Long v. St. Joseph Life Ins. Co., 225 S. W. (Mo. App.) 106 at 107 (1920).

[15] Benham v. American Central Life Ins. Co., 140 Ark. 612 at 618, 217 S. W. 462 at 463 (1919). Italics added.

[16] Whether the insured was on leave or furlough, or was performing military or naval duties, become matters of consequence.

[17] Pertinent questions are: Did the death or disability result from the service? Was it a disease common to civilian and military alike? Was accidental death, like an auto accident, common to both civilian and military alike? Was death within the extra risk occasioned by military or naval service?

[18] See Kelly v. Fidelity Mut. Life Ins. Co., 169 Wis. 274, 172 N. W. 152 (1919), where the court limited the exception to a cause "peculiar to military service," recovery was allowed for the death of insured when a motorcycle skidded 100 miles from the front lines in France, insured being a messenger carrying dispatches at the time.

[19] Young v. Life & Casualty Ins. Co. of Tennessee, 204 S. C. 386, 29 S. E. (2d) 282 (1944), permitted recovery for death growing out of an auto accident while on furlough, on the ground that the exemption was not arbitrary, not status, but was designed to eliminate the extra risks arising while insured is in military service.

deceased,[20] which death or disability must result from such service[21] or from war,[22] as in the instant case, before the exemption clause becomes effective. Thus, as was pointed out in *Gorder* v. *Lincoln National Life Insurance Company*,[23] the cause must have some distinctive character intimately related to the military service and not be a hazard which would have been insured against had the soldier remained in civilian life. Phrases such as "result of" or "in consequence of" are typical earmarks to be watched for in cases falling in this class. But again, the "result" reasoning is met in the "activity" decisions. Contributing or remote cause is insufficient;[24] it must be the direct cause.[25]

The exemption clause in the instant case[26] is clearly within this latter division and is so analyzed and discussed by the court. "War or any act incident thereto" doubtless caused the insured's presence in New Zealand, even to his participating in training maneuvers, but since the death of the insured occurred in the course of routine training, it did not result from an act "incident" to war. Causation doctrines have been succinctly applied to this type of exemption both by the Massachusetts[27] and Federal District courts,[28] but difficulty has been encountered in defining the term "war." A recent Iowa case,[29] while correctly an-

[20] Cases and clauses in this group are: Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (1944), ("death resulting from war or any act incident thereto"); Eggena v. New York Life Ins. Co., 236 Iowa 262, 18 N. W. (2d) 530 (1945), ("death resulted directly or indirectly from war or any act incident thereto"); Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N. E. (2d) 687 (1942), ("death resulted directly or indirectly from war or any act incident thereto"); Gorder v. Lincoln Nat. Life Ins. Co., 46 N. D. 192, 180 N. W. 514, 11 A. L. R. 1080 (1920), ("death in consequence of such [military or naval] service without the company's permit"); Smith v. Sovereign Camp, W. O. W., 204 S. C. 193, 28 S. E. (2d) 808 (1944), ("if disability shall result from military or naval service in time of war").

[21] See Gorder v. Lincoln Nat. Life Ins. Co., 46 N. D. 192, 180 N. W. 514 (1920), and Smith v. Sovereign Camp, W. O. W., 204 S. C. 193, 28 S. E. (2d) 808 (1944).

[22] Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (1944).

[23] 46 N. D. 192, 180 N. W. 514 (1920).

[24] The court in Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (1944), held that the death of a naval ensign at Pearl Harbor on Dec. 7, 1941, in the course of the Japanese sneak attack was accidental. Gorder v. Lincoln Nat. Life Ins. Co., 46 N. D. 192, 180 N. W. 514 (1920), held that death from pneumonia in Liverpool within a week of debarkation from a troop transport was not in consequence of military service.

[25] Smith v. Sovereign Camp, W. O. W., 204 S. C. 193, 28 S. E. (2d) 808 (1944). But see Eggena v. New York Life Ins. Co., 236 Iowa 262, 18 N. W. (2d) 550 (1945), which denied liability for death when a tank in which insured was riding crashed from a bridge during training activities in the United States, and the comment thereon in Hooker v. New York Life Ins. Co., 66 F. Supp. 313 at 317 (1946).

[26] The clause read: ". . . if the insured's death resulted, directly or indirectly from . . . (d) war or any act incident thereto." 66 F. Supp. 313 at 314.

[27] Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N. E. (2d) 687 (1942).

[28] Hooker v. New York Life Ins. Co., 66 F. Supp. 313 (1946), and Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (1944).

[29] Eggena v. New York Life Ins. Co., 236 Iowa 262, 18 N. W. (2d) 530 (1945).

nouncing the problem under the same exemption to be one of causation, nevertheless misapplies the doctrine[30] for it conceives the term "war" to refer to a period of time rather than to a causative factor.

But discussion and attempts at classification yield little of practical value for the lawyer confronted with a similar exemption clause. Excellent and exhaustive annotations[31] and discussions[32] serve only to highlight the confusion. Clauses used by the same insurance company have been held sufficient to exempt in one case in one jurisdiction[33] but inoperative in another.[34] A court of the same state, strongly anti-status when allowing recovery for death from influenza in the United States,[35] nevertheless later denied recovery for death from pneumonia in France on the basis that status, not activity, was the ground of limitation under almost identical clauses.[36] Even comparable fact situations have been productive of different results. For example, the death of a seaman on a United States destroyer, sunk by a torpedo in the North Atlantic in 1941 was held to be "from war", although prior to any formal declaration,[37] but death during the bombing of Hawaii by Japanese planes was treated as not "in time of war."[38]

Definition and comparison, then, do not resolve the problem, for there are no well-defined "rules." Objective analysis demonstrates that the genesis of the problem lies in the need for judicial construction of "ambiguous" exemption clauses. The obvious remedial action is to reexamine the verbiage used in the policy, for a concise, clear, complete exemption should leave no room for ambiguity and consequent construc-

[30] See comment in Hooker v. New York Life Ins. Co., 66 F. Supp. 313 at 317 (1946).

[31] See annotation to West v. Palmetto State Life Ins. Co., 202 S. C. 422, 25 S. E. (2d) 475 (1943), in 145 A. L. R. 1461 and the general annotation in 137 A. L. R. 1263 bringing earlier World War I notes down to date. The latter annotations may be found in 15 A. L. R. 1280, 11 A. L. R. 1091, 7 A. L. R. 378, and 4 A. L. R. 845.

[32] Two of the better articles on the subject are: Barton, "The War and Aviation Clauses in Life Insurance Policies," 24 Neb. 264 (1945), and Rively, "War Clauses in Life Insurance Policies," 46 Dick. L. Rev. 192 (1942). See also comment on Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (1944), in 25 Bost. U. L. Rev. 289 (1945).

[33] Miller v. Illinois Bankers' Life Ass'n, 138 Ark. 442, 212 S. W. 310 (1919).

[34] Illinois Bankers' Life Ass'n v. Davaney, 102 Okla. 302, 226 P. 101 (1924).

[35] Gorder v. Lincoln Nat. Life Ins. Co., 46 N. D. 192, 180 N. W. 514 (1920).

[36] Olson v. Grand Lodge A. O. U. W. of North Dakota, 48 N. D. 285, 184 N. W. 7 (1921).

[37] Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N. E. (2d) 687 (1942).

[38] Savage v. Sun Life Assur. Co., 57 F. Supp. 620 (1944); Rosenau v. Idaho Mut. Ben. Ass'n, 65 Ida. 408, 145 P. (2d) 227 (1944); and West v. Palmetto State Life Ins. Co., 202 S. C. 422, 25 S. E. (2d) 475 (1943), all permit recovery for deaths incurred during the Japanese attack on Pearl Harbor.

tion. Certainty of exemption would not only benefit both insured and insurer but would minimize the need for judicial construction.[39]

It is obviously impossible, however, to re-write exemption clauses in the course of current litigation. But careful and accurate analysis and presentation of the problem from the standpoint of the purpose of the exemption clause,[40] where construction may be necessary, should avoid further chaos that might arise from attempting to match definitions or from the comparison of verbiage. Correct analysis should first involve an inquiry as to whether any construction is necessary; not whether the clause can possibly be made ambiguous. If the clause is fairly and objectively ambiguous, however, that ambiguity should be resolved, upon careful analysis of the exemption, in terms of *status, activity,* or *result.* Particularly to be avoided is the "rewriting" of the clause in terms of another exemption. When analyzing the exemption, primary attention should be given to the exemption as a whole, viewed in its entirety. If it appears, after fair consideration, that *status* or *activity* of the insured, in contrast to disability *resulting* from service of war, is the basis of avoidance of liability, the ordinary rules for each class may then be applied to achieve a final determination as to whether or not the death or disability occurred within or without the particular exemption.

W. O. KROHN

LANDLORD AND TENANT—RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD—WHETHER OR NOT RIGHT OF ACTION FOR FORCIBLE DETAINER IS IN TRUSTEE OR IN BENEFICIARY OF A LAND TRUST—The case of *Liberty National Bank of Chicago* v. *Kosterlitz*[1] presented a novel problem concerning the respective rights of a trustee and a beneficiary under a land trust to maintain an action for forcible entry and detainer; a problem made more complicated because of the existence of certain regulations promulgated by the Office of Price Administration. Title to the premises involved had been vested in the plaintiff, as trustee, under a typical land trust agreement which declared that the right of the beneficiary was simply one of personal property nature and gave him no legal or equitable interest in the real estate. The defendant had been a tenant from month

[39] Changing methods of warfare, new means of starting or "declaring" war, as well as increased civilian participation in war activities pose additional problems for the framers of exemption clauses.

[40] *I. e.,* was the purpose to avoid liability for *any* death; for death from any reason *all the time* insured is a soldier, sailor, or marine; only for the *extra hazard* while insured is actively performing military duties; or for death occurring as a *result* of military duties; or for death from an act of war, even as applied to civilians; or for death from any other specific hazard?

[1] 329 Ill. App. 244, 67 N. E. (2d) 876 (1946).

to month, had been served with notice of termination of tenancy by the beneficiary acting as agent for the trustee, and, upon failure to vacate, had been sued for possession of the premises by the trustee under authority of a certificate of eviction issued by OPA in the name of the beneficiary. Summary judgment in the trial court in favor of plaintiff was reversed on appeal by defendant on the ground that the trustee, although possessed of the right to sue under local law, lacked the necessary authority under OPA regulations in the absence of a certificate issued in the name of the trustee, and the existence of such a certificate favoring the beneficiary of the trust was of no consequence since the latter could have no right of action under local law.

As the existence of a proper OPA certificate issued in the name of the plaintiff would seem, by the decision, to be an essential prerequisite to an action for possession and not just a mere procedural technicality,[2] the first question presented is whether or not such a certificate could be obtained by one who merely holds title in trust for another. The rent regulations presently direct that such certificate shall be issued to the "landlord" upon compliance with certain requirements not here material, and the term "landlord" is therein defined to be "an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations or an agent of any of the foregoing."[3] While no construction has been given to these provisions by the courts as yet, it would seem that a person vested with the rights and powers ordinarily conferred upon a trustee should be entitled to have such a certificate. In *Wahl* v. *Schmidt*,[4] for example, it was indicated that, at least in a court of law, a trustee holding the legal title together with the right to possession was to be regarded as "owner" of the premises, having all the rights and subject to all the liabilities attaching to ownership. Whether a trustee can be said to be a person "entitled to receive rent" for the premises, so as to come within the definition of "landlord," is, however, a matter entirely dependent upon the terms of the trust agreement. If the agreement, as in the instant case, gives to the beneficiary the control of the management of the property, including renting thereof and the collection and handling of rents, a strict construction of the regulation in question would lead to the conclusion that the trustee, while holder of the legal title, is not a person "receiving or entitled to receive rent" from the premises, hence

[2] O. P. A. Maximum Rent Regulation No. 28, § 6(B)(2)(1), requires the purchaser of rented premises desiring to occupy the same personally to obtain such a certificate before pursuing his remedies under local law to oust the tenant.

[3] Ibid., § 13(a).

[4] 307 Ill. 331, 138 N. E. 604 (1923). See also, Randolph v. Hinck, 288 Ill. 99, 123 N. E. 273 (1919).

could not procure the necessary certificate.[5] If so, and the necessary certificate is to be issued solely to the beneficiary, the problem then becomes one as to whether or not the beneficiary may maintain the action, for if he cannot and the trustees cannot get the requisite certificate it would seem that the resulting stalemate would prevent ouster of the tenant.

The prime issue in every action for forcible entry and detainer is one concerning the right to possession,[6] for questions concerning title are immaterial[7] and may not be determined therein.[8] That it is the right to possession which must be emphasized is borne out by the cases which hold that it is the lessee who should sue the hold-over tenant[9] rather than the lessor, since the latter, after lease granted, no longer has the right to possession.[10] If the beneficiary can be said to enjoy the right to possess and likewise holds the requisite certificate, it would seem to follow that the action can be successfully maintained by him, provided he sues in his own name but in his capacity as beneficiary. Recourse to the trust instrument will be necessary to establish the beneficiary's right to possession so careful analysis of its terms would be highly desirable. The court in the instant case, although by way of dictum, indicated that the common provisions found in the usual land trust agreement[11] gave the

[5] The court in the instant case concluded that the declaration in the trust agreement that the beneficiary's interest was solely personal property overrode the provisions therein regarding management, so as to prevent the beneficiary from being "landlord" to the defendant: 329 Ill. App. 244 at 246, 67 N. E. (2d) 876 at 877. It is understood that the Regional Office of the Chicago Defense Rental Area, perhaps on the theory that if the beneficiary is not "landlord" then the trustee must be, has now issued a certificate of eviction in the name of the trustee, plaintiff in the instant case.

[6] Ill. Rev. Stat. 1945, Ch. 57, § 2. See also Biebel Roofing Co. v. Pritchett, 373 Ill. 214, 25 N. E. (2d) 800 (1940); West Side Tr. & Sav. Bank v. Lopoten, 358 Ill. 631, 193 N. E. 462 (1934).

[7] Palmer v. Frank, 169 Ill. 90, 48 N. E. 426 (1897).

[8] Davis v. Robinson, 374 Ill. 553, 30 N. E. (2d) 52 (1940).

[9] Allen v. Webster, 56 Ill. 393 (1870); Travis v. Geiger, 215 Ill. App. 461 (1919); Geo. J. Cooke Co. v. Kaiser, 163 Ill. App. 210 (1911).

[10] Gazzolo v. Chambers, 73 Ill. 75 (1874).

[11] The instant agreement provided, among other things, that "the interest of any beneficiary hereunder shall consist solely of a power of direction to deal with the title of said property and to manage and control said property as hereinafter provided, and the right to receive the proceeds from rentals and from mortgages, sales or other disposition of said premises, and that such right in the avails of said property shall be deemed to be personal property, and may be assigned and transferred as such . . . and that no beneficiary now has, and that no beneficiary hereunder at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds as aforesaid." It also provided that the "beneficiary or beneficiaries hereunder, in his, her or their own right shall have the management of said property and control of the selling, renting and handling thereof, and shall collect and handle the rents, earnings, avails and proceeds thereof, and said trustee shall have no duty in respect to such management or control, or the collection, handling or application of such rents, earnings, avails or proceeds, or in respect to

beneficiary no rights in the real estate or its possession since the beneficiary had nothing which could be made the subject of a lease to a tenant unless any lease negotiated by the beneficiary was made by him as agent for the trustee. It cited only one case in support of that view, that of *Chicago Title & Trust Company* v. *Mercantile Trust & Savings Bank*,[12] which case is not squarely in point for the issue there was whether or not a judgment against a beneficiary was superior to the lien of a mortgage subsequently executed by the trustee. No question of the right of the beneficiary to possession of the premises was involved therein, hence the support from such a case is slender. The inference to be drawn from other cases, also involving land trusts of the type here concerned, wherein the trustee has been isolated from liability for personal injury to persons coming on the premises because of absence of possession, control or management,[13] would seem to dictate an opposite conclusion.

The suggested conflict between these decisions makes the instant case even more unique, for if credit is given to both views then neither trustee nor beneficiary has the right to possession. As all the rights incident to property ownership were once vested in the settlor of such a trust, he must have, by the terms of the conveyance and the trust indenture, transferred them to the trustee and the beneficiary jointly or divided such rights between them. If the beneficiary is also the settlor, as here, the agreement would not confer rights on him but such rights would be regarded as reserved unless clearly given to the trustee.[14] It cannot be supposed that the beneficiary, having been given the right or having reserved the right to manage and control the property, including the renting and handling thereof, acts simply as agent for the trustee,[15] so it should follow that such a beneficiary is vested with the right to possession unless the arrangement indicates the contrary. If the trustee is charged with the duty of management, it could well be implied that possession should be vested in him[16] in order that such duty might be

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the payment of taxes or assessments or in respect to insurance, litigation or otherwise, except on written direction as hereinabove provided, and after the payment to it of all money necessary to carry out said instructions." Such provisions are believed to be typical of trust agreements covering land in the Chicago area.

[12] 300 Ill. App. 329, 20 N. E. (2d) 992 (1939).

[13] Brazowski v. Chicago Title & Trust Co., 280 Ill. App. 293, leave to appeal denied 280 Ill. App. xiii (1935), noted in 13 CHICAGO-KENT REVIEW 383; Whitaker v. Central Trust Co., 270 Ill. App. 614 (1933), abst. opin.

[14] Irish v. Antioch College, 126 Ill. 474, 18 N. E. 768 (1888); Equitable Trust Co. v. Fisher, 106 Ill. 189 (1883).

[15] Gallagher & Speck v. Chicago Title & Trust Co., 238 Ill. App. 39 (1925).

[16] Perry, Trusts and Trustees, Vol. 1, § 329. See also Yates v. Yates, 255 Ill. 66, 99 N. E. 360, Ann. Cas. 1913D 143 (1912); McDale v. Shepardson, 53 Ill. App. 513 (1893), appeal dismissed 156 Ill. 383, 40 N. E. 953 (1895); Williamson v. Wilkins, 14 Ga. 416 (1854); Ellis v. Woodruff, 88 Kan. 734, 129 P. 1193 (1913).

performed, but if the plain intention is otherwise all such considerations must give way[17] unless the parties, by their conduct, have furnished their own interpretation of the situation.[18]

These views are not affected by such decisions as that in *Continental Illinois National Bank & Trust Company* v. *Windsor Amusement Company,*[19] for the court there relied upon a special provision, not typically found in land trust agreements, to the effect that "the trustee is the sole owner . . . and so far as the public is concerned has full power to deal" with the property, as warranting suit for possession by the trustee against a hold-over tenant. The term "public" in such provision was held to include persons in the defendant's position, but without such clause it is doubtful if that result would have been obtained. The holding in *Chicago, North Shore & Milwaukee Railway Company* v. *Chicago Title & Trust Company,*[20] a condemnation action in which it was regarded as unnecessary to make the beneficiary a party defendant because the trust agreement declared his interest to be personal property only, is likewise not controlling for the agreement there gave the power of management to a third person.

The law can well be assumed to be, therefore, that the right to possession may be in the beneficiary and that he, by virtue of such right, is entitled to bring a forcible entry and detainer action to recover possession of trust premises. The instant case, however, does serve as a warning that care must be exercised in undertaking such an action as to real estate held in trust. J. P. RAUSCHERT

[17] For cases where, by express language in the trust agreement, the beneficiary was given the right to possession, see: Lethbridge v. Lethbridge, 3 DeG. F. & J. 523, 45 Eng. Rep. 981 (1861); Freeman v. Cook, 14 N. C. 373 (1848); Lewis v. Henry's Ex'ors, 69 Va. (28 Grat.) 192 (1877). See also Bogert, Trusts and Trustees, Vol. 3, § 583. For cases where, from the surrounding circumstances, it could be said that the beneficiary had the right to possession, see: Glover v. Stamps, 73 Ga. 209 (1884); Fernstler v. Seiberg, 114 Pa. 196, 6 A. 165 (1886); School Directors v. Dunkleberger, 6 Pa. (Burr) 29 (1847).

[18] The record in the instant case would indicate that rent, after attornment, had been paid by checks made payable to the trustee and all requisite notices, etc., had been given by the beneficiary as agent for the trustee. Such conduct may serve to disclose that the parties themselves regarded the trustee as the one having the right to possession. If so, the court's statement that the beneficiary had no right to sue must be regarded as being correct under the circumstances.

[19] 288 Ill. App. 57, 5 N. E. (2d) 606 (1936).

[20] 328 Ill. 610, 160 N. E. 226 (1928).

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER OR NOT REFUSAL OF UNION WORKER TO ACCEPT NONUNION EMPLOYMENT DISQUALIFIES FOR UNEMPLOYMENT COMPENSATION—In the recent Ohio case of *Chambers* v. *Owens-Ames-Kimball Company*,[1] plaintiff was an unemployed union carpenter drawing benefits under the local Unemployment Compensation Act.[2] Being able to work and available for work, as required by the pertinent provision of the statute,[3] he was referred to a nonunion job as a carpenter. He refused the proffered employment on the ground that, as acceptance of the nonunion job would violate the rules of his union,[4] and would subject him to expulsion,[5] he was excused from accepting the employment by a statutory provision[6] which provided that an individual shall not lose the right to benefits by reason of a refusal to accept new work, if, "as a condition of being so employed," he would be denied the right to retain his membership in the union and to observe its lawful rules. The Board of Review of the Bureau of Unemployment Compensation interpreted "condition" to refer to restrictions and qualifications contained in the offer of employment made by the employer to the prospective employee, and did not mean "result" of being so employed as plaintiff contended. From an order suspending the employment benefits, plaintiff appealed to the Common Pleas Court, where the order of the administrative tribunal was affirmed. The Court of Appeals reversed the judgment and remanded the cause,[7] and the case came before the Ohio Supreme Court upon motion to certify the record of the intermediate court. The Supreme Court, two justices dissenting, reversed the judgment of the Court of Appeals and affirmed that of the Common Pleas on the ground that "condition," as used in the statute, was the equivalent of "requisite" or "requirement," and

[1] 146 Ohio St. 559, 67 N. E. (2d) 439 (1946). Zimmerman, J., wrote a dissenting opinion, concurred in by Bell, J.

[2] Ohio Gen. Code, § 1345-1 et seq., 119 Ohio Laws 836.

[3] Ibid., § 1345-6 a (4).

[4] § 7, ¶ C of the trade rules of the local union provided that no members "will be permitted to work on jobs where nonunion carpenters are working, or for employer [sic] who employs nonunion carpenters." See 146 Ohio St. 559 at 560, 67 N. E. (2d) 439 at 440.

[5] The union rules provided that any "officer or member who wilfully . . . violates the trade rules of the locality in which he is working . . . may be fined, suspended or expelled, as the local union may decide." See 146 Ohio St. 559 at 560, 67 N. E. (2d) 439 at 440.

[6] Ohio Gen. Code, § 1345-6a(1), 119 Ohio Laws 836, declares that "No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if: (1) As a condition of being so employed, he would be required to join a company union, or to resign from or refrain from joining any bonafide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization."

[7] 44 Ohio Law Abs. 146, 62 N. E. (2d) 496 (1945).

that to hold otherwise would permit the statute to operate in an unconstitutional manner through the discrimination that would result by granting benefits to a union worker while denying them to a nonunion worker under similar circumstances.

State unemployment laws generally provide that an individual, to be eligible for benefits, must be able to work and must be available for work; and that an individual shall be ineligible for benefits if he has failed, without good cause, to accept suitable work when the same is offered. A clause usually enumerates a number of factors which shall be considered when determining the suitability of work. In addition to these, all state laws contain a clause, corresponding to the so-called "labor standards provision" of the Internal Revenue Code,[8] which in substance provides that "Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work . . . (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."[9]

One author, when interpreting this provision, has stated that where the employee would be forced to resign from a union, he would not be disqualified from receiving benefits if he refused the employment; but where he would be expelled from the union, disqualification will follow, for the expulsion is a result of, and is not required as a condition to, being employed. He has recommended, however, that regardless of the reasonableness or unreasonableness of the union rule, a finding should be made that the individual had good cause for refusing the employment, since loss of status is a substantial harm to him.[10]

The decision in *Barclay White Company* v. *Unemployment Compensation Board of Review*[11] accords with this recommendation, for the claimant there, referred to a job as a ship's carpenter, refused the employment after notice by the secretary-treasurer of the union that acceptance of the referral would result in the member's suspension. It was held that although the work was suitable within the meaning of the act, the claimant refused it with good cause and was therefore not disqualified from benefits. The court said that the rights which membership in a union confers upon its members constitute property so valuable that equity will restrain against their impairment.

[8] 26 U. S. C. A. § 1603(a)(5).

[9] See, for example, Ill. Rev. Stat. 1945, Ch. 48, § 223(c)(2).

[10] A. M. Menard, "Refusal of Suitable Work," 55 Yale L. J. 134 (1945), particularly p. 143.

[11] Pa. Super. Ct., 1946, CCH Unemployment Insurance Service ¶ 8140.

Of a contrary tenor, however, is the decision in *Bigger* v. *Unemployment Compensation Commission*.[12] There, plaintiff, an unemployed union painter, declined a nonunion job and justified his refusal, among other reasons, by reliance on the non-disqualification clause in the Delaware Act. He contended that the words "condition of being employed" should be interpreted to mean a condition which inheres in the entering upon or carrying out of the employment, as distinguished from a condition imposed by an employer. The court, holding the employment to be suitable and denying compensation, said that the interpretation sought by the plaintiff could not be attained by judicial construction, but that resort must be had to legislative sanction. It also pointed out that the phrases "resign from" and "expelled from" are not analogous, but opposed to each other.

In a number of other instances, courts in passing upon the justification of a refusal to work, have as a rule denied benefits on the ground that the claimant was not available for work.[13] Thus in *Huiet* v. *Schwob Manufacturing Company*[14] the claimant left her job to follow her husband to a military camp, where she was unsuccessful in finding employment. Upon notice of a claim for benefits, her former employer advised that her former position was still open. She refused to return and was disqualified on the ground that she was not available for employment previously held. In *Mills* v. *South Carolina Unemployment Compensation Commission*[15] the applicant was a married woman who had been employed on the third shift. Desiring to devote some time to her family, she refused to work on shifts other than the first or second. The court held that limited availability for work disqualified her from benefits. Likewise in *Kut* v. *Albers Super Markets, Inc.*,[16] the applicant, a member of the orthodox Jewish faith, refused Saturday employment and was disqualified from benefits on the ground that he was not available for work.

These latter cases illustrate the decision that may be expected when the refusal is a matter of independent choice and is not dictated by considerations imposed from without. In the instant case, however, the plaintiff was not at liberty to accept the nonunion employment without risk of serious consequences. In view of the fact that courts have upheld the right of labor unions to prohibit their members from working with

[12] 46 A. (2d) (Del. Super. Ct.) 137 (1946).

[13] See the cases collected in an annotation to Fannon v. Federal Cartridge Corporation, 219 Minn. 306, 18 N. W. (2d) 249 (1945) to be found in 158 A. L. R. 396.

[14] 196 Ga. 855, 27 S. E. (2d) 743 (1943).

[15] 204 S. C. 37, 28 S. E. (2d) 535 (1944).

[16] 76 Ohio App. 51, 63 N. E. (2d) 218 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 281 (1946).

nonunion men and to enforce such rules through fines or expulsion,[17] it is submitted that the result reached by the instant case is not satisfactory from the hapless employee's standpoint, for he is, as it were, caught in the middle between conflicting alternatives. The court, it seems, could well find that, whether the loss of union status is demanded as a condition of employment or comes as a result of the employment, the employee had good cause for refusing the tendered work. The only other alternative is to deny the power of unions to make and to enforce rules prohibiting their members from accepting nonunion employment.

It is interesting to note, in this connection, that the Illinois Unemployment Compensation Act[18] contains a non-disqualification clause similar to the federal labor standards provision.[19] Although not judicially construed as yet, the decision of the Board of Review in the matter of *Dunbar* v. *Biggs*[20] is typical. There, the claimant, a steam fitter, was referred to a contractor who had not qualified under the rules of the union to which the employee belonged. Informed by his union that he would be subject to disciplinary action if he accepted the employment, the claimant did not report for work. It was held that there was good cause for refusing the work, for the principle seems to be established in Illinois, at least to the Director's satisfaction, that work is not suitable if its acceptance will jeopardize the employee's union relations, especially where the main reliance for a livelihood is placed on such an affiliation. However, since the most recent employer is a party to the determination of the claimant's eligibility for benefits,[21] and can appeal to the courts from an adverse ruling after his administrative remedies are exhausted,[22] the matter may yet be made the basis of judicial determination in this state.[23]

J. E. GALT

[17] Cohn & Roth Electric Co. v. Bricklayers', etc., Local U. No. 1, 92 Conn. 161, 101 A. 659, 6 A. L. R. 887 (1917); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D 661 (1917).

[18] Ill. Rev. Stat. 1945, Ch. 48, § 217 et seq.

[19] Ibid., § 223(c)(2).

[20] See Decision No. 46-BRD-425 (46-RD-1800), May 2, 1946.

[21] Ill. Rev. Stat. 1945, Ch. 48, § 225(b).

[22] Ibid., § 230.

[23] The employer in Biggs v. Dunbar is now seeking judicial reversal of the decision of the Board of Review. See case No. 46C-7058, Circuit Court of Cook County, Illinois.